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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 948

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CYRUS HIGGINSON, On Behalf of Himself and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit

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Cyrus Higginson, on behalf of himself and all other former landowners, or heirs, successors and assigns thereof, of thirty-six thousand acres, namely

Camp Breckenridge, in Union, Henderson and Webster Counties, Kentucky, petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on September 28, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra* pp. i-xvii) is reported at 384 Fed. 2d 504 (1967). The opinion of the District Court (App. B, *infra* pp. xviii-xxiii) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1967 (App. C, *infra,* p. xxiv). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) Whether the United States may sell mineral rights in land, so as to incur very substantial profits, when the land was acquired by the United States from its citizens during a war emergency for a temporary military camp.

(2) Whether in a federal condemnation action a federal court should devise a federal doctrine of real property or apply the already developed law of the state in which the property to be condemned is situated.

(3) Whether, under Kentucky law, property condemned for a temporary use is acquired by the condemning authority as a fee simple determinable or an easement rather than a fee simple absolute.

(4) Whether, under Kentucky law, the condemning authority acquires the mineral rights as well as the surface rights in land condemned for a temporary use.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. 1346(a) provides:

> "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally

assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

50 U.S.C. section 171 provides:

"The Secretary of the Army may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided,* That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of the Army shall be reasonable, he

may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further,* That the Secretary of the Army is authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further,* That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes."

40 U.S.C. section 258 (a) provides:

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation

finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. . . ."

STATEMENT

During the first year after the outbreak of World War II the United States Government condemned all but 16 of the approximately 36,000 acres of land involved herein and established a United States Army Garrison at Morganfield, Kentucky, known as Camp Breckenridge.

This land was obtained from plaintiff and several thousand other former landowners for approximately $3,600,000, or about one hundred dollars ($100.00) per acre.

At the time of the acquisition of the land by condemnation, the former landowners were told by agents of the United States that they would have the right and opportunity to repurchase the land after termination

of the use for which the land was taken. The former landowners were told that the Government was acquiring the land solely for the purpose of constructing and maintaining a *temporary* military camp during the period of the national emergency. At the time of the condemnation proceeding, the former landowners were denied the right to prove the value of the mineral rights involved.

Camp Breckenridge was established as a *temporary* military camp in furtherance of the national war program. The structures and improvements located thereon consisted of World War II temporary construction. Camp Breckenridge was first placed in inactive status during February 1946 and has remainded in inactive status since 1953.

After the abandonment of Camp Breckenridge as a temporary military camp, the Government offered the mineral rights on the subject property for sale. Offers to puchase those rights were received in an amount exceeding $32,000,000. Considering only those offers, that amount spread out over the entire area would equal almost $1,000 per acre, or ten times what the Government paid to the former landowners for their land.

On April 15, 1965, Cyrus Higginson brought a class action under Rule 23(a) of the Federal Rules of Civil Procedure in the United States District Court for the Western District of Kentucky, Owensboro Division, against the United States of America, on behalf of himself and several thousand other former landowners.

The Third Amended Complaint was in two counts. The first count of the Complaint prayed that the Government be directed to sell the property to plaintiffs in accordance with the terms of Section 23(d) of the Surplus Property Act of 1944 (58 Stat. 777). The second count was for judgment under 28 U.S.C. 1346(a) (2), in the sum of $9,300 as "reasonable rental" for the property for the period of occupancy by the Government for the period subsequent to the abandonment of the use of the property as a temporary military camp.

The District Court held that the petitioner failed to state a claim upon which relief could be granted under both counts of the Third Amended Complaint.

The Court of Appeals affirmed the District Court on the merits. The Court of Appeals held that the title taken by federal condemnation under a federal condemnation statute is subject to determination by federal law unless Congress states otherwise. Furthermore, the Court of Appeals held that if Kentucky law were to be applied, the circumstances surrounding the condemnation transaction indicated an intention and purpose to transfer a fee simple title, subject only to certain specified easements.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this Court. This Court has not

faced the question as to whether the United States may sell at a substantial profit, land which was acquired by eminent domain, from its citizens, during a war emergency for a temporary military camp.

The Court of Appeals has rendered a decision which is in conflict with the decisions of other Courts of Appeals on the same matter. The Court of Appeals has held that the interest acquired in a federal condemnation action is determined by federal law and not by the law of the state in which the land is located, whereas the other circuits which have considered this issue have held that the law of the state in which the land is located is applicable.

The Court of Appeals has decided an important state question in a way in conflict with applicable state law. The Court of Appeals has held that under Kentucky law the interest acquired by the United States was a fee simple absolute. Furthermore, the Court of Appeals held that the United States acquired the mineral rights along with the surface rights in the federal condemnation action.

The first question presented is whether the United States may sell mineral rights in land, so as to incur very substantial profits, when the land was acquired by the United States from its citizens during a war emergency for a temporary military camp.

In 1942, when the United States condemned the land involved, the Government needed the land immediately for purposes of a temporary military camp. The Second World War had just broken out and it

was necessary to have facilities available to train the necessary troops.

At the time of the taking of the land, the former landowners were informed that the Government was acquiring the property solely for the purpose of constructing and maintaining a temporary military camp during the period of the national emergency. The Government did, in fact, only occupy this property for the purpose of a temporary military camp. The taking of the property for a period longer than the period for which it was to be acquired, and the acquiring of rights greater than those necessary for the purpose of the construction and maintenance of a temporary military camp constituted a taking of the former owners' property without due process of law and without payment of just compensation therefor, in violation of the Fifth Amendment to the Constitution of the United States.

Furthermore, the fact that the former landowners were denied the right to prove, at the time of the condemnation proceedings, the value of the mineral rights on and under the properties, constituted a taking of property without payment of just compensation.

At the time of the taking, the former landowners were specifically told that they would be given an opportunity to repurchase the land after the termination of use as a temporary military camp by the Government. The former landowners were told they would be able to purchase the land for the same price paid by them and they relied upon such representations made by Government agents in arriving at the decision

to sell and convey their land for the price agreed upon. Had it not been for these representations and promises, most of the former landowners would not have voluntarily agreed to accept the purchase price.

50 U.S.C. 171 provided that the Secretary of the Army could cause condemnation proceedings to be initiated to condemn land for the site, location, consumption, or prosecution of work for fortifications, coast defenses, military training camps.

The declaration of taking involved stated that the lands to be condemned were condemned under 50 U.S.C. 171.

The declaration stated:

> "The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the establishment of a triangular division camp. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of Camp Breckenridge, Union and Henderson Counties, Kentucky, and for each other use as may be authorized by Congress or by Executive Order, and are required for immediate use."

Nowhere in the declaration of taking or in the authorizing statutory provision is mention made of condemning land for the purpose of selling mineral rights to oil companies. The land was taken only for a temporary military camp. It was not taken to be later sold at excessive profits for oil rights.

The petition in condemnation accompanying each taking stated:

> "The Secretary of War, acting under authority vested in him by said Acts has determined that in his opinion, under said War Purposes Act, it is necessary and advantageous to acquire for the United States of America by condemnation under judicial process, certain lands hereinafter to be described by perimeter descriptions, for the purposes of the acts above set forth, to be utilized for the establishment of a triangular division camp, in furtherance of the national war program."

The declaration of taking stated that 50 U.S.C. Section 171 authorized the *acquisition of land for military purposes.* The petition in condemnation states that the land was to be used *in furtherance of the national war program.* The purpose of the condemnation action was clear.

It is unconscionable for the United States to sell, at a substantial profit, the mineral rights which it claims it acquired when the land herein was obtained. Even *if* the United States did acquire the mineral rights, it would be improper for the Government to sell these mineral rights at so great a profit. This land was obtained during a war emergency from the citizens of the United States for a temporary military camp only. The several thousand citizens who sold their land to the United States during the war emergency for a military camp did so for that reason only. They had no intention of giving to the Government enormously valuable mineral rights.

The United States Government is not in the business of selling mineral rights at terrific profits. This Court

should decide this important question of federal law which has not been decided and thus determine whether the Government of the United States can realize substantial profits on the sale of land taken in an emergency from its citizens.

The second question presented is whether the interest acquired in a federal condemnation action is determined by concepts of federal law or by the law of the state in which the land is located.

The second count of the Third Amended Complaint was brought under 28 U.S.C. 1346(a)(2) to recover rent under an implied contract.

Petitioner contends that when the land was abandoned by the Government as a temporary military camp, under the law of Kentucky, it reverted to the former landowners. The petitioner brought an action against the United States for payment of rent for lands used and occupied by the Government since 1953, since at that time the land reverted to the former landowners. The Government, by retaining the lands, had an implied contract to pay a rental therefor.

This same theory was successfully followed in *Etheridge v. United States,* 218 F.Supp. 809 (E.D.N.C. 1963). In the *Etheridge* case, the plaintiff brought an action for recovery of reasonable rental value of property which had been condemned by the Government for a life-saving station and then abandoned. The Court permitted the plaintiff to recover for the rental value of the land after its abandonment for the

purpose for which it was taken. The *Etheridge* case was under the same section of the Tucker Act as this case. The Court, in *Etheridge,* faced the question of whether the real property conveyed to the United States reverted to the plaintiff when the property ceased to be used by the United States as a Coast Guard Life-Saving Station. The statutory authority gave the Secretary of the Treasury authority to acquire the right to occupy sites for life-saving stations. The Court in *Etheridge,* at page 811, stated that:

> "The entire issue before the Court rests upon the kind of estate conveyed by the deed to the defendant. In determining this point, the substantive law of North Carolina will apply."

In this connection, see also *United States v. Roebling,* 244 F.Supp. 736 (N.J. 1965) and *United States v. Chartier Real Estate Co.,* 226 F.Supp. 285 (R.I. 1964).

The Court of Appeals below stated that:

> ". . . we believe that the nature of title taken by federal condemnation under a federal condemnation statute is subject to determination by federal law, unless Congress states otherwise."

The Court of Appeals, in so holding, has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matter. The Court of Appeals for the Fifth Circuit held in *Leiter Minerals, Inc. v. United States,* 329 F.2d 85 (5th Cir. 1964) at page 90 that:

> "We have no doubt that the Congress could make federal law applicable, but we are equally clear

> that it has no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of federal Statute making federal law applicable."

Leiter Minerals, Inc. v. United States was subsequently vacated by this Honorable Court and dismissed as moot (318 U.S. 413 (1965)). However, this dismissal did not affect the validity of the decision rendered by the Court of Appeals.

There is a decision and rehearing by the Second Circuit Court of Appeals in direct conflict with the decision by the Court of Appeals below in the instant case. In *United States v. Certain Property in Borough of Manhattan,* 306 F.2d 439 (2nd Cir. 1962), the Court held that, in order to determine what interest the United States Government took in condemnation, it is necessary to look to the law of the state in which the property is located. The Court, in an entire section, devoted to the very problem involved herein, entitled: "The Respective Roles of Federal and State Law", states that:

> "Many of the controversies before us hinge on what the Government 'took'. The Government contends that determination of what is taken in Federal condemnation proceedings and the ascertainment of compensation therefor are governed by principles of federal law, and that New York property law concepts are therefore irrelevant. It relies on such unquestionable propositions as that the United States' power of condemnation 'can neither be enlarged nor diminished by a state.

> Nor can any state prescribe the manner in which it must be exercised', *Kohl v. United States,* 91 U.S. 367, 374, 23 L.ed. 449 (1876) and that '. . . where essential interests of the Federal Government are concerned federal law rules unless Congress chooses to make state laws applicable', *United States v. 93.970 Acres of Land,* 360 U.S. 328, 332-333, 79 S.Ct. 1193, 1196, 3 L.ed. 1275 (1959). Acceptance of all this and of the corollary that Federal law governs the principles whereby 'just compensation' is determined in a Federal condemnation still does not establish the conclusion the Government draws from them . . .
>
> We see no basis for doubting that Congress meant that a Federal court, in determining what such a taking embraced, should look to the law of the state where the property is located. Although the Government urges us to look to 'Federal law' to determine what the taking included, it does not tell where to find this—no corpus on Federal law on this subject exists and 1962 seems rather late to start developing one, especially for so limited a function. . . . Although the principle announced in *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188 (1938), would not deprive Congress of Constitutional power to create a separate 'Federal law' as to what constitutes real property for Federal condemnation, see *Clearfield Trust Co. v. United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.ed. 838 (1943), the practical considerations for referring to state law for that purpose are overwhelming. All states have bodies of law as to what is real and what is personal property, which they require for a variety of transactions. Persons dealing in land within

a state must conduct themselves in light of state law, which will inevitably govern most of their relations; it would be inconvenient in the last degree if they had also to take cognizance of a Federal property law that would apply only in the rather rare event of a Federal condemnation. Hence we hold that Congress meant us to refer to New York law to determine what the United States acquired when it 'took' what it did here, (citations)."

On rehearing in *United States v. Certain Property in Borough of Manhattan,* 344 F.2d 142 (2nd Cir. 1965), the panel was composed of Judges Moore, Friendly and Marshall. The Court of Appeals' earlier decision was affirmed. The Court stated at page 144 that:

"Most of the points raised by the United States were argued, both initially and on petition or rehearing, on the former appeal, before a panel consisting of Chief Judge Lumbard, Judge Kauffman and the writer. (Judge Friendly) We could rest on our previous opinion both because it is the law of the case (citations), and because we are satisfied with it. But the vigor of the Government's attack, its apparent inability to understand what we decided, and the importance of the issues prompt us to make another attempt to specify our points of agreement and disagreement with its position.

* * * * * * *

Our disagreement rests both on reason and on authority. The *Clearfield* opinion itself noted 'in our choice of the applicable Federal Rule we have

occasionally selected state law'. 318 U.S. at 367, 63 S.Ct. at 575. When there is no substantial evidence of Congressional intent, the decision of a Federal court whether to fashion a set of distinctively federal principles or to follow state rules must turn, in large measure, on the relative importance of nationwide uniformity and of uniform treatment of similarly situated persons in the same state. See Professor Mishkin's perceptive article, The Variousness of 'Federal Law': Competence and Discretion in the Choice of National and State Rules for Decisions, 105 U. Pa. L.Rev. 797, 810-32 (1957). Here the convenience to federal takers and Government lawyers in having the same writ run on both sides of the Hudson is of slight significance as compared to the need for New York businessmen planning to invest in trade fixtures to know that what is real property on Broadway if the City or State condemns it, will be no less real property if taken instead by the Federal Government. . . .

"In our previous opinion, we cited decisions of three other circuits as holding that a federal court will normally apply state concepts of real property in determining what comes within a Federal taking. *United States v. Becktold Co.*, 129 F.2d 473 (8th Cir. 1942); *United States v. 19.86 Acres of Land,* 141 F.2d 344, 151 A.L.R. 1423 (7th Cir. 1944); *Carmichael v. U. S.*, 273 F.2d 392 (5th Cir. 1960)."

It is clear that the above Second Circuit case is directly contrary to the case at issue herein. However, it should be noted that the Sixth Circuit below

did not even refer to or cite once the Second Circuit case, either the original case or the case on rehearing. This is despite the fact that the cases were extensively briefed and argued at the oral argument. In this connection, it should also be noted that *Etheridge v. United States,* supra, also was not dealt with by the Court of Appeals below, although it too was extensively briefed and treated at the oral argument.

There are four circuits contrary to the Sixth Circuit opinion below. These are the Second Circuit *(United States v. Certain Property in Borough of Manhattan,* supra); the Fifth Circuit *(Leiter Minerals, Inc. v. United States,* supra; *Carmichael v. U. S.,* supra); the Eighth Circuit *(United States v. Becktold Co.,* supra); and the Seventh Circuit *(U. S. v. 19.86 Acres of Land,* supra).

The third question presented is whether under Kentucky law the interest acquired in a Federal condemnation action is a fee simple absolute or a lesser interest.

The Court of Appeals held that if Kentucky law applied, the United States would still obtain a fee simple title. The Court of Appeals cited three Kentucky cases: *Craddock v. U. of Louisville,* 303 S.W. 2d 548 (1957); *Kentucky Elec. v. Wells,* 75 S.W.2d 1088 (1934); *Binder v. Board,* 5 S.W.2d 903 (1928).

The Court of Appeals decided an important question of Kentucky law in a way in conflict with applicable Kentucky decisions.

The law of Kentucky is well developed on the point herein involved and it clearly indicates that the description in a declaration of taking in a condemnation proceeding is not dispositive of the issue but that a more involved analysis of the entire transaction is called for. There are fifteen decisions in Kentucky involving the precise point herein. In all but three of these cases it was held that when property is acquired by condemnation the interest acquired is *not* a fee simple absolute, but a lesser interest. The three contrary cases are easily distinguishable. All fifteen cases were treated in the briefs submitted by petitioner before the Court of Appeals. The trial court had referred to only two cases. (*Craddock v. U. of Louisville,* supra, and *Binder v. Board,* supra). The United States in its brief before the Court of Appeals referred to the same two cases. The Court of Appeals, as indicated above, referred to the *Craddock* and *Binder* cases and also referred to *Kentucky Electric v. Wells,* supra.

Those three cases are, of course, the three cases that are distinguishable and run contrary to the general rule established by the twelve Kentucky cases.

Those twelve Kentucky cases, not dealt with by the Court of Appeals, are as follows:

Lexington, 4 P. Turnpike Road Co. v. McMurtry, 42 Ky. 516 (1843);

Kelly v. Donahue, 59 Ky. 482 (1859);

Morris v. Schollsville Branch Red River Turnpike Road, 69 Ky. 671 (1869);

Cynthiana R. C. Turnpike Co. v. Hutchinson, 60 S.W. 378 (1901);
Halley v. Scott County Fiscal Court, 78 S.W. 149 (1904);
Dickerson v. Goocoy, 159 S.W. 539 (1913);
Keown v. Brandon, 266 S.W. 889 (1924);
Kentucky-W. Va. Gas Co. v. Hayes, 37 S.W. 2d 17 (1931);
Mammoth Cave Natl. Park Assn. v. State Highway Commission, 88 S.W.2d 931 (1935);
Sherman v. Petroleum Exploration, 132 S.W. 2d 768 (1939);
Rose v. Bryant, 251 S.W.2d 860 (1952);
McGee v. Williamstown, 308 S.W.2d 795 (1957).

The most recent pronouncement of the Kentucky Court of Appeals on the point involved herein, is *McGee v. Williamstown,* supra. The Court stated, at page 798:

> "There is likewise no merit in the argument that the city obtained a fee simple title to appellant's acreage, although the conveyance to the city indicates this character of title was deeded to it. *It is a well-settled rule of law in this state that a deed executed pursuant to a condemnation proceeding ordinarily conveys an easement in the condemned property. Rose v. Bryant,* 251 S.W.2d 860. Even where the deed purports to convey a fee, the words of the deed are not controlling and the grantee may hold the property only as long as it is devoted to the purposes for which

> it was acquired. It is clear from the case law of this jurisdiction that upon the abandoning of an easement, the land will revert to the grantor or his heirs at law or his successors." *Mammoth Cave Natl. Park Assn. v. State Highway Commission,* 88 S.W.2d 931. (Emphasis added.)

It should be noted that in both *Mammoth Cave Natl. Park Assn.* and *McGee* a fee simple was said to have been conveyed. The Court held that the fact that the right acquired was designated as a fee is not controlling.

In each of the above twelve cases, the Court of Appeals of Kentucky found that the interest acquired by condemnation is only an easement or a fee simple determinable and not a fee simple absolute. These cases involved a turnpike road, a quarry, a toll house, a railroad right of way, a gas line, a telephone line, and a reservoir. There are no Kentucky cases involving a temporary military camp, but such a camp, temporary in nature, built for the war duration only, is much less permanent than a road, quarry, toll house, railroad, gas line, telephone line or reservoir.

The cases cited by the Court as representing Kentucky law, do not in fact represent Kentucky law and the cases are easily distinguishable. The *Binder* case and the *Craddock* case are both school cases. School cases have historically been distinguished by the Kentucky courts because the Kentucky legislature specifically provided that on abandonment of property condemned for school purposes, the local school

board has authority to sell the property and use the proceeds to purchase other property for school purposes. This statutory provision clearly implies that in a school condemnation the condemning authority takes a fee simple absolute.

Kentucky Elec. Development Co.'s Receiver v. Wells, supra, is also distinguishable. That case involved a situation where there was adverse possession by the taker for over 100 years and no privity of title was present in the plaintiff. For those reasons that case cannot be considered to be a valid precedent.

The Kentucky cases, including those cited above, make it absolutely clear that when the use of a fee simple determinable or an easement is abandoned, the land automatically reverts to the grantor. *Cynthiana R. C. Turnpike Co. v. Hutchinson,* supra; *Halley v. Scott County Fiscal Court,* supra; *Mammoth Cave Natl. Park Assn. v. State Highway Commission,* supra; *Rose v. Bryant,* supra; *McGee v. Williamstown,* supra.

The fourth question is whether under Kentucky law the United States acquired the mineral rights along with the surface rights in the federal condemnation action.

The conveyances from the former landowners to the United States contained reservations and exceptions of all coal and mineral rights underlying said land. The deeds stated that:

> "This conveyance made subject to all oil and gas leases of record that are still in force, also except

all coal and mineral rights heretofore conveyed, if any."

It is a well settled principle of law in the state of Kentucky that such an exception or reservation of minerals in a grant or deed is effective to exclude from them the conveyances even though the minerals have not been previously sold or leased: *Bolen v. Casebolt,* 66 S.W.2d 19; *Gibson v. Sellers,* 252 S.W.2d 911; *Bartley v. Rowe,* supra.

It is stated in 23 Am.Jur.2d, Deeds, Section 264:

"An exception of a specific part of the subject matter of the grant is effectual to exclude it from the grant notwithstanding an untrue circumstance is recited in relation to the accepted part. Thus, where the grantor 'reserved', that is excepted, numbered lots from his grant as 'sold', it has been held that all the lots were excepted although some had not been sold. Similarly, the validity of an exception of minerals and mineral rights previously conveyed is in no way dependent on the validity of the prior instrument as a conveyance."

Thus, it can be seen that the United States did not acquire an interest in and to the oil, gas or other minerals underlying the land of Camp Breckenridge, Kentucky.

See also 36 A.L.R.2d 1424 and 6 A.L.R.3rd 297, 300.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Appendices A, B and C Follow)